Supreme Court, U.S.
FILED
AUG 24 1979
MICHAEL RODAK, JR., CLERK

79-305
No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

J. LEE HAVENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

ANN T. WALLACE
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provision involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	17
Appendix A	1a
Appendix B	10a
Appendix C	11a
Appendix D	13a

CITATIONS

Cases:

Agnello v. *United States*, 269 U.S. 20	*passim*
Alderman v. *United States*, 394 U.S. 165	11
Brown v. *United States*, 411 U.S. 223	11
Desist v. *United States*, 394 U.S. 244	11
Doyle v. *Ohio*, 426 U.S. 610	8
Harris v. *New York*, 401 U.S. 222	7, 9, 10, 12, 13, 15, 17
McGautha v. *California*, 402 U.S. 183	13
Miranda v. *Arizona*, 384 U.S. 436	10
Oregon v. *Hass*, 420 U.S. 714	7, 9, 10, 12, 17
People v. *Rahming*, 26 N.Y.2d 411, 259 N.E.2d 727, 311 N.Y.S.2d 292	7
People v. *Taylor*, 8 Cal.3d 174, 501 P.2d 918, 104 Cal. Rptr. 350, cert. denied, 414 U.S. 863	7

Cases—Continued — Page

Rakas v. *Illinois*, No. 77-5781 (Dec. 5, 1978) 11
State v. *Kidd*, 281 Md. 32, 375 A.2d 1105, cert. denied, 434 U.S. 1002 7
Stone v. *Powell*, 428 U.S. 465 11
United States v. *Calandra*, 414 U.S. 338.. 11
United States v. *Ceccolini*, 435 U.S. 268.... 11
United States v. *Cervantes*, 542 F.2d 773 7
United States v. *Grayson*, 438 U.S. 41..... 13
United States v. *Hickey*, 596 F.2d 1082.... 7, 14
United States v. *Janis*, 428 U.S. 433..... 11
United States v. *Mandujano*, 425 U.S. 564 13
United States v. *Mariani*, 539 F.2d 915.... 7, 17
United States v. *Pantone*, No. 78-1123 (3d Cir. July 19, 1979) 14
United States v. *Peltier*, 422 U.S. 531..... 11
United States v. *Trejo*, 501 F.2d 138..... 7
United States v. *Whitson*, 587 F.2d 948.... 7, 10, 15, 17
Walder v. *United States*, 347 U.S. 62..... 6, 8, 9, 10, 12, 16

Constitution and statutes:

United States Constitution, Fourth Amendment 2, 3
18 U.S.C. 2 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 952(a) 2
21 U.S.C. 960(a)(1) 2
21 U.S.C. 963 2

In the Supreme Court of the United States

OCTOBER TERM, 1978

No.

UNITED STATES OF AMERICA, PETITIONER

v.

J. LEE HAVENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 592 F.2d 848.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 10a) was entered on April 5, 1979. A timely

petition for rehearing was denied on June 27, 1979 (App. C, *infra*, 11a-12a). Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including August 26, 1979 (App. D, *infra*, 13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence suppressed as the fruit of an unlawful search and seizure may nevertheless be used to impeach a defendant's false trial testimony, given in response to proper cross-examination, where the evidence does not squarely contradict the defendant's testimony on direct examination.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, respondent was convicted of possessing cocaine with intent to distribute it and of importing and conspiring to import cocaine, in violation of 21 U.S.C. 841(a)(1), 952(a), 960(a)(1), and 963 and 18 U.S.C. 2. He

was sentenced to three concurrent eight-year terms of imprisonment, to be followed by a special parole term of three years, and to a fine of $5,000.

The evidence showed that on October 2, 1977, respondent and John Kenneth McLeroth, both attorneys from Fort Wayne, Indiana, arrived at the Miami Airport on a flight from Lima, Peru (Tr. 14-16, 33-34, 54-56, 65-66, 340).[1] McLeroth underwent a customs search, which revealed 13 bags containing more than three pounds of cocaine sewed into 12 makeshift pockets in a T-shirt under his clothing (Tr. 15-24; Gov. Exhs. 1-3). He advised customs officials that respondent was travelling with him, and he implicated respondent in the importation of the cocaine (Tr. 31-34, 41-42, 48-49, 127). DEA agents then arrested respondent, who had already cleared customs (Tr. 53). Following the arrest, the agents searched respondent's luggage without a warrant. Inside the luggage, the agents found two medium-sized T-shirts. One of them had pieces cut out of it that corresponded to the pockets sewed into McLeroth's T-shirt (Tr. 386-389). Prior to trial the court suppressed the two T-shirts found in respondent's luggage on the ground that the search of the luggage violated respondent's Fourth Amendment rights.[2]

After pleading guilty, McLeroth testified for the government at respondent's trial. He discussed sev-

---

[1] "Tr." refers to the transcript of the proceedings at trial.

[2] The government did not challenge the suppression order in the court of appeals, and we raise no issue here regarding its correctness.

eral trips that he and respondent had made to Peru.[3] He also testified that respondent had supplied him with the altered T-shirt (Tr. 112) and had sewn the pockets of the T-shirt to prevent the bags from falling out (Tr. 123-124).

Respondent testified in his own defense and denied any involvement in cocaine smuggling (Tr. 341-342, 348, 351, 375). He then testified as follows (Tr. 375):

> Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> A. Yes, I did.
>
> Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> Q. I did not.

On cross-examination, respondent testified as follows (Tr. 383-384):

---

[3] During the first trip, in April 1977, McLeroth had smuggled approximately four pounds of cocaine into the country, for which he received $15,000 from respondent (Tr. 89, 101-102, 111). In early June 1977, respondent made a second trip to Lima alone. Upon his return, respondent informed McLeroth that his connection in Lima "was very apprehensive and was not about to provide any further cocaine source at that time" (Tr. 105). The third trip, in early September 1977, was unsuccessful because the "source" in Lima had been arrested (Tr. 114-116). The fourth trip ended with respondent's arrest.

> Q. Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth, is that correct?
>
> A. I don't—I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with Mr. McLeroth in connection with this cocaine matter.
>
> * * * * *
>
> Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on the tee shirt?
>
> A. Absolutely not.
>
> Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977, did you have in your suitcase Size 38-40 medium tee shirts?

Defense counsel objected to this question (Tr. 385), but, after some discussion, the court overruled the objection and permitted the prosecutor to pursue that line of questioning, which continued as follows (Tr. 404):

> Q. On that day, sir, did you have in your luggage a Size 38-40 medium man's tee shirt with swatches of clothing missing from the tail of the tee shirt?
>
> A. Not to my knowledge.
>
> * * * * *
>
> Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for identification

and ask you if this tee shirt was in your luggage on October 2nd, 1975 [*sic*]?

A. Not to my knowledge. No.

Respondent further denied having told a DEA agent that the T-shirts found in his suitcase belonged to McLeroth (Tr. 405-406). On rebuttal the government called the agent, who testified that he had found two T-shirts, including Government Exhibit 9, in respondent's suitcase and that respondent had stated that they belonged to McLeroth (Tr. 439-441).

Relying primarily on *Agnello* v. *United States*, 269 U.S. 20 (1925), and *Walder* v. *United States*, 347 U.S. 62 (1954), the court of appeals reversed respondent's conviction. The court stated that those cases require that illegally seized evidence may be used for impeachment only if the predicate for its use in impeachment is found in the defendant's direct examination and only if the evidence contradicts a particular statement made by the defendant (App. A, *infra*, 6a-7a). Applying these principles, the court held that since respondent was not asked and did not testify about the T-shirt or the contents of his luggage until cross-examination, this case "falls squarely within" this Court's decision in *Agnello*, and the evidence was not admissible even for the limited purpose of impeachment (App. A, *infra*, 9a).

REASONS FOR GRANTING THE PETITION

1. This case presents an important and recurring question concerning the circumstances in which illegally seized evidence may be used to impeach a

defendant's false testimony at trial. The court of appeals held that *Agnello* v. *United States*, *supra*, prohibits the use of illegally obtained evidence for impeachment except where the evidence specifically contradicts particular statements made during the defendant's direct testimony. Its approach of distinguishing between direct and cross-examination testimony is in accord with decisions in three other courts of appeals.[4] However, these decisions are inconsistent with the decisions of this Court in *Harris* v. *New York*, 401 U.S. 222 (1971), and *Oregon* v. *Hass*, 420 U.S. 714 (1975), and their effect is to limit severely the ability of the prosecution to cross-examine defendants effectively, by giving defendants a license to commit perjury without fear of impeachment.

The facts of the instant case illustrate the serious obstacles to bringing out the truth on cross-examination that are inherent in broadly applying the exclusionary rule whenever the defendant's direct testimony is not precisely contrary to the implications of the tainted evidence. Here, the respondent, an at-

---

[4] *United States* v. *Hickey*, 596 F.2d 1082 (1st Cir. 1979); *United States* v. *Whitson*, 587 F.2d 948 (9th Cir. 1978); *United States* v. *Mariani*, 539 F.2d 915 (2d Cir. 1976); *United States* v. *Trejo*, 501 F.2d 138, 145 (9th Cir. 1974) (dictum); see also *State* v. *Kidd*, 281 Md. 32, 375 A.2d 1105, cert. denied, 434 U.S. 1002 (1977); *People* v. *Taylor*, 8 Cal. 3d 174, 501 P.2d 918, 104 Cal. Rptr. 350 (1972), cert. denied, 414 U.S. 863 (1973); *People* v. *Rahming*, 26 N.Y.2d 411, 259 N.E.2d 727, 311 N.Y.S.2d 292 (1970); but see *United States* v. *Cervantes*, 542 F.2d 773 (9th Cir. 1976).

torney who was aware that the T-shirts had been suppressed, tailored his testimony carefully to avoid specific mention of the T-shirts. Yet by testifying that he had nothing to do with the draping of material around McLeroth's body or "that kind of activity" on the fourth visit to Peru, the respondent certainly left the impression with the jury that, contrary to McLeroth's testimony, he had nothing to do with preparing the T-shirt for use in the smuggling attempt. A proper and obvious line of cross-examination was to ask the respondent about his connection with the T-shirt. Moreover, McLeroth had already testified concerning the respondent's role in preparing the T-shirt, so this line of cross-examination cannot be said to have itself been a "fruit" of the illegal search. Nor can it be considered an attempt to "smuggle in" tainted evidence by means of cross-examination only remotely connected to the defendant's direct testimony. See *Walder*, *supra*, 347 U.S. at 66.

Under the decision of the court of appeals, however, respondent was free to perjure himself in response to the cross-examination without fear of impeachment by the evidence in the possession of the government. Under this approach, defendants, being aware of the suppressed evidence, will be able to tailor false defenses to avoid impeachment, thus frustrating the truth-seeking function of a trial. See *Doyle* v. *Ohio*, 426 U.S. 610, 617 n.7 (1976). The instant case is a classic example of the use of the exclusionary rule, not as a shield, but as "a license

to use perjury by way of a defense." *Harris* v. *New York*, *supra*, 401 U.S. at 226; *Oregon* v. *Hass*, *supra*, 420 U.S. at 722.

The court of appeals in this case relied on *Agnello* to support this result, but the rationale on which *Agnello* rests has been repudiated by this Court. In that case, the defendant was indicted for conspiracy to sell a package of cocaine. He denied committing the offense, and, on cross-examination, he denied ever having seen cocaine before. The government was then permitted to introduce in rebuttal a can of cocaine found in the defendant's bedroom pursuant to an illegal search. The Court reversed, stating that the essence of the exclusionary rule was that illegally seized evidence "not be used at all." 269 U.S. at 35. In *Walder* v. *United States*, *supra*, the defendant testified on direct that he had never possessed narcotics, and the Court held that it was proper for the government to introduce for impeachment purposes narcotics that had been unlawfully seized from the defendant a few years earlier. Because *Walder* involved an unusual situation, where the defendant volunteered false testimony on direct that was not necessary to his defense, the holding was not inconsistent with the result in *Agnello*. The Court noted this point, stating that in *Agnello* the prosecution had attempted to "smuggle in" tainted evidence on cross-examination. 347 U.S. at 66. Contrary to the apparent conclusion of the court below (App. A, *infra*, 5a-7a), however, this explanation does not support its decision here; since respondent gave false answers to cross-examination questions

properly within the scope of direct, the tainted evidence was not "smuggled in."

In *Harris* v. *New York*, *supra*, the Court went well beyond the narrow holding of *Walder* and permitted the use of suppressed evidence to impeach false testimony bearing directly on the crimes charged. Moreover, the Court flatly repudiated the rationale relied upon in *Agnello* that illegally obtained evidence must be completely excluded from trial. It stated that the establishment of an exclusionary rule for statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), did not imply that "evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes." 401 U.S. at 224. The Court further explained that the deterrence rationale of the exclusionary rule is satisfied when the evidence is made unavailable in the prosecution's case in chief. 401 U.S. at 225. The Court went on to point out the importance of the impeachment evidence in aiding the jury in finding the truth, cautioning that the privilege of a defendant to testify "cannot be construed to include the right to commit perjury." *Ibid.* These principles were reiterated in *Oregon* v. *Hass*, 420 U.S. 714, 722 (1975). Nonetheless, because *Harris* and *Hass* did not expressly limit it, the court of appeals stated that *Agnello* was not in conflict with those decisions (App. A, *infra*, 5a) and felt compelled to follow it.[5]

[5] In fact, *Agnello* is still sometimes cited for "the basic proposition that illegally obtained evidence may not be used in a criminal trial." See *United States* v. *Whitson*, *supra*, 587 F.2d at 951.

Moreover, the Court has ruled in many other contexts that the exclusionary rule is not to be applied in all cases and has established the principle that its application is to be "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). In accordance with this principle, the Court has declined to apply the exclusionary rule in a variety of contexts in which the deterrent effect of exclusion on police misconduct does not outweigh the cost to society that would result from excluding the evidence. See, *e.g.*, *United States* v. *Ceccolini*, 435 U.S. 268, 279-280 (1978); *Stone* v. *Powell*, 428 U.S. 465, 489-491 (1976); *United States* v. *Janis*, 428 U.S. 433, 448-454 (1976); *United States* v. *Calandra*, *supra*. In each of these cases this Court has recognized the dispositive factor to be the degree of additional deterrence that suppression could be expected to provide in the particular circumstances.[6]

It is the duty of the courts to balance the serious restriction on cross-examination and associated interference with the truth-seeking function of the jury against the deterrence benefit to be gained from ap-

[6] A similar analysis underlies decisions declining to apply the exclusionary rule retroactively (see, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975); *Desist* v. *United States*, 394 U.S. 244, 254 n.24 (1969)), and decisions denying "standing" to persons who were not themselves the victims of unconstitutional searches. See, *e.g.*, *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 5-7; *Brown* v. *States*, 411 U.S. 223, 229 (1973); *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969).

plying the exclusionary rule in that limited number of cases where the defendant takes the stand and gives false answers in response to proper cross-examination questions. This Court has already suggested how that balance should be struck. It has stated that sufficient deterrence flows when the evidence cannot be used in the prosecution's case in chief.[7] *Harris, supra*, 401 U.S. at 225. *Harris, Hass*, and *Walder* each involved impeachment of a defendant's direct testimony with tainted evidence, but there is nothing in those decisions that limits the principles laid down there to impeachment of false testimony on direct examination. In each of those cases this Court made it clear that the primary concern is the avoidance of the perversion of the truthfinding function by permitting a defendant's false testimony to go unchallenged. False testimony during cross-examination is no less insidious than false testimony during a defendant's direct testimony. When a defendant voluntarily takes the stand, he is "under an obligation to speak truthfully and accurately," 401 U.S. at 225, both on direct and on cross-examination. "Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are

[7] Moreover, the evidence would be admissible only for the limited purpose of impeaching the defendant's credibility. The ability to impeach cross-examination testimony in addition to direct testimony cannot significantly increase what is only a "speculative possibility" that illegal searches will be encouraged. *Harris, supra*, 401 U.S. at 225.

therefore imperative." *United States* v. *Mandujano*, 425 U.S. 564, 576 (1976) (plurality opinion).

Considering that little if any incremental deterrence of illegal searches and seizures can reasonably be anticipated from a rule barring impeachment use of illegally seized evidence, the courts should be free to discourage perjury by permitting false answers to proper cross-examination to be impeached by otherwise suppressed evidence.[8] Yet until this Court expresses a view on the continuing vitality of *Agnello*, the lower courts will apparently continue to feel bound by the holding in that case to apply the exclusionary rule in all cases where the tainted evidence does not directly contradict the defendant's direct testimony. Thus, despite what we take to be the clear import of *Harris*, the courts of appeals generally have not engaged in a detailed analysis of the merits of applying the exclusionary rule in a situation where perjured testimony is permitted to go unrefuted although evidence of the perjury exists. Indeed, the court of appeals in this case did not even advert to the problem of allowing perjured testimony to go unchallenged.

[8] This rule does not impinge upon the defendant's right to testify in his own behalf. That right is simply "the right to testify truthfully * * *. There is no protected right to commit perjury." *United States* v. *Grayson*, 438 U.S. 41, 54 (1978). To the extent that the possibility of impeachment may have "any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible." 438 U.S. at 54. The fact that the impeachment may relate to matters brought out on cross-examination is a consequence of the defendant's decision to take the stand, which carries with it the obligation to respond to cross-examination. See *McGautha* v. *California*, 402 U.S. 183, 215 (1971).

Because *Agnello* has never been explicitly limited by this Court, the lower courts have generally felt compelled to limit impeachment to perjury on direct testimony,[9] even though some judges have expressed their misgivings about the rule. Thus, the First Circuit recently stated:

> At least without further guidance from the Supreme Court, we feel bound to join these courts in holding that suppressed evidence may not be used to impeach statements elicited from a defendant on cross-examination, where the defendant has not testified as to the subject matter of the suppressed evidence in his direct examination. * * *
>
> The foregoing analysis may seem artificial, to be sure. It can be criticized as allowing a defendant to lie safely on cross-examination but not on direct. But it is the rule that best reconciles *Agnello* with the *Harris* line of authority, and it is a reasonable way to minimize any incentive for the government to secure evidence illegally.

United States v. *Hickey*, 596 F.2d 1082, 1088 (1st Cir. 1979).[10] The Court should grant review here in

[9] In fact, this limitation ascribed to *Agnello* has even been applied beyond its limited area of the exclusion of illegally obtained evidence. In *United States* v. *Pantone*, No. 78-1123 (3d Cir. July 19, 1979), the court, relying on *Agnello*, held that "other crimes" evidence, which would have been admissible under Rule 404 of the Federal Rules of Evidence to impeach direct testimony, could not be introduced to impeach a defendant's false testimony on cross-examination. Slip op. 12-13.

[10] See also Judge Kilkenny's statement that "[i]t is wholly illogical to hold that a defendant may not hide beyond the shield of the *Miranda* rule if he perjures himself on direct examination, but may invoke the protection of *Miranda* if he perjures himself on the same subject matter on cross-examination." *United States* v. *Whitson*, *supra*, 587 F.2d at 953 (Kilkenny, J., concurring and dissenting).

order to provide that guidance. Rather than forcing courts to seek the "best reconciliation" of *Agnello* and *Harris*, whose underlying rationales are fundamentally inconsistent, a principled examination should be given to the propriety of applying the exclusionary rule to exclude impeachment by illegally obtained evidence.

2. The fundamental legal issue presented by this case is whether a distinction should be drawn between false testimony on direct examination and false testimony in response to proper cross-examination in deciding whether to admit illegally seized evidence for the purpose of impeachment. The courts of appeals have held that *Agnello* v. *United States*, *supra*, requires such a distinction, and we contend that this distinction is unsound and that *Agnello* should be limited or overruled. This case also presents a subsidiary issue of considerable practical importance. We believe that, even if *Agnello* is held to have continuing vitality for purposes of barring use of illegally seized evidence to impeach false answers regarding subjects truly brought up for the first time on cross-examination, this case was wrongly decided because of the scope of respondent's direct testimony.

Here, by clear implication, albeit not explicitly, respondent's direct testimony denied any role in arranging the means to be used for the smuggling

attempt. If such direct testimony is not deemed sufficient under *Walder* to justify impeachment by means of illegally seized evidence, then *Walder* is little more than a holding limited to its rather unusual and non-recurring facts. Defendants will have little difficulty in tailoring their direct testimony to suggest the truth of a proposition contradicted by the suppressed evidence while making no specific statement that can be squarely contradicted by that evidence. Surely, the prohibition in *Walder* against "letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility," 347 U.S. at 65, was not meant to be limited solely to cases where the suppressed evidence squarely contradicts a particular statement of the defendant. If it is so limited, the threat of impeachment by means of suppressed evidence will not deter defendants from testifying falsely on direct examination—they will just be required to proceed more carefully in tailoring their false testimony. Under the result reached by the court of appeals, they will enjoy exceptionally broad latitude in this endeavor.

The cases decided by other courts of appeals have not involved such extensive direct testimony, and it is questionable whether those courts would find it appropriate to read *Agnello* as broadly as did the court of appeals in this case. The language of those decisions suggests that those courts would apply the *Agnello* rule only when the cross-examination opens up an entirely new subject matter, and that they

would have permitted impeachment in this case. In *United States* v. *Whitson*, 587 F.2d 948, 952 (9th Cir. 1978), the court noted that the defendant did not raise the issue on direct and stated that the weight of authority was that tainted evidence could not be used to impeach "on a matter not opened by the defendant." In *United States* v. *Mariani*, 539 F.2d 915, 924 (2d Cir. 1976), the court relied on the lack of a "nexus" between the direct examination and the cross-examination.

The Court should grant review in this case to reexamine *Agnello* and expressly decide whether it should be overruled or, alternatively, to what extent it should be limited in light of *Harris* and *Hass*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

ANN T. WALLACE
Attorney

AUGUST 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-5411

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

J. LEE HAVENS, DEFENDANT-APPELLANT

April 5, 1979

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, GOLDBERG and VANCE, Circuit Judges.

VANCE, Circuit Judge:

J. Lee Havens was convicted of conspiring to import cocaine into the United States,[1] of importing approximately 1490 grams of cocaine into the United States,[2] and of knowingly and intentionally possessing with intent to distribute approximately 1490 grams of cocaine.[3] He received three concurrent eight-year sentences and a fine of $5,000. His appeal to this court challenges the lower court's ruling allowing the

---

[1] In violation of 21 U.S.C. §§ 952(a), 960(a)(1), and 963.

[2] In violation of 21 U.S.C. §§ 952(a), 960(a)(1), and 18 U.S.C. § 2.

[3] In violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

introduction of suppressed evidence.[4] We reverse the judgment of conviction and remand for a new trial.

On October 2, 1977, Havens and John Kenneth McLeroth, both of whom were lawyers from Fort Wayne, Indiana, arrived at the Miami International Airport on a flight from Peru. Customs Officer William Percival searched McLeroth and found cocaine sewed into makeshift pockets in a T-shirt under his clothing. McLeroth told the investigating officers that Havens was traveling with him and implicated Havens in the importation of the cocaine. D.E.A. agents arrested Havens, who had cleared Customs approximately four hours earlier, searched him, and seized and searched his luggage without a warrant. No controlled substance was found. A T-shirt was found, however, from which pieces were cut that corresponded to the pockets sewed to McLeroth's T-shirt. On motion by Havens prior to trial, the T-shirt and other evidence seized during the search of Havens' suitcase were suppressed.

McLeroth was charged along with Havens in the three-count indictment. Immediately before trial McLeroth changed his plea and pleaded guilty to one count of the indictment in exchange for dismissal of two remaining counts. During Havens' trial he testified that he, Havens and other persons were engaged in a scheme to import cocaine into the United States.

---

[4] Havens' contention that the evidence was insufficient is clearly without merit. We do not treat his other contentions because they involve rulings on matters that are not likely to recur upon retrial of his case.

He claimed that because he needed money desperately he had agreed to become a "mule" and to smuggle cocaine into the United States for Havens.

Havens denied involvement with the cocaine and claimed that he had visited Peru on legitimate business. On direct examination by his own counsel and after he had denied involvement in the importation of the cocaine, Havens was questioned and responded as follows:

> Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> A. Yes, I did.
>
> Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> A. I did not.

On cross-examination the prosecutor asked the following questions with the indicated answers:

> Q. Now, on direct examination, sir, you testified on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?
>
> A. I don't . . . I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.

* * * *

Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?

A. Absolutely not.

Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977, did you have in your suitcase Size 38-40 medium tee shirts?

At this point the jury was excused and a discussion between the court and counsel ensued with respect to the admissibility of this line of questions. The court ultimately ruled that the interrogation would be allowed. Havens was then asked,

Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for identification and ask you if this tee shirt was in your luggage on October 2nd, 1975 [*sic*]?

A. Not to my knowledge. No.

After defendant rested, Customs Agent Martinez was recalled as a rebuttal witness. The trial court previously had ruled that if Havens admitted on cross-examination that the T-shirt was in his luggage, it could not be introduced into evidence. Because he denied it, Martinez was allowed to testify that the T-shirt was found in Havens' suitcase. Over objection the T-shirt was then received into evidence.

The government argues that introduction of the challenged evidence for impeachment purposes is supported by *Walder* v. *United States*, 347 U.S. 62 (1954), and its progeny, *Harris* v. *New York*, 401 U.S. 222 (1971), and *Oregon* v. *Hass*, 420 U.S. 714 (1975). In *Walder* the Supreme Court approved the

introduction into evidence of illegally seized heroin for the purpose of impeaching the defendant's direct testimony that he had never possessed narcotics. *Harris* allowed the impeachment of defendant's direct testimony by a prior inconsistent statement not obtained in conformity with *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In *Oregon* v. *Hass*, *supra*, the court similarly allowed impeachment with a prior statement obtained by law enforcement officers after the defendant had requested an attorney. In all three cases the challenged evidence contradicted direct testimony given by defendant in his own defense.

This line of authority is now well ingrained in our jurisprudence. Its policy is stated in *Walder*:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.

347 U.S. at 65. These cases should not be read, however, as being in conflict with *Agnello* v. *United States*, 269 U.S. 20 (1925). Indeed, the *Walder* court took pains to distinguish the facts before it by pointing out that in *Agnello* the basis of the contradiction was elicited on cross-examination of the defendant.

Agnello testified on direct examination that he had received certain packages from a co-defendant, but that he did not know their contents and would not have carried them if he had known they contained narcotics. On cross-examination he said that he had never seen narcotics. At that point, over his objection, the prosecutor produced a can of cocaine which had been seized in his bedroom and asked him if he had ever seen it. After he denied having seen it, the government was allowed to introduce into evidence the can of cocaine that was the product of an illegal search and previously had been excluded.

In reversing Agnello's conviction the Supreme Court held,

> And the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search.

269 U.S. at 35.

From the *Agnello-Walder* framework, two requirements emerge that bear on the admissibility of the otherwise illegal evidence received against Havens. First, the predicate for its use in impeachment must be found in the direct examination of the defendant. It cannot be smuggled into evidence by the prosecutor

on cross-examination. Second, the evidence in question must contradict a particular statement made by the defendant. An arguable conflict with a simple denial of guilt does not meet this test. In *Walder* the court said,

> [T]he Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.

347 U.S. at 65 (footnote omitted).

The second requirement is demonstrated by two recent cases involving the interplay of the *Agnello-Walder* holdings under similar facts. In both *United States* v. *Mariani*, 539 F.2d 915 (2d Cir. 1976), and *United States* v. *Trejo*, 501 F.2d 138 (9th Cir. 1974), the defendant took the stand, denied guilt, and testified generally in respect to his version of the facts. In neither case did the defendant testify about the particular object that had been illegally seized until the testimony was elicited from him on cross-examination. Both courts concluded that receipt of the questioned evidence for impeachment purposes constituted error.

In the present case the controlling rule was obviously misunderstood by the trial judge. The colloquy

between the defense counsel and the court, during which the complained of rulings were made, included the following:

> MR. McCAIN: How can he be impeached, Your Honor, if it was not covered on direct, whether or not he had—
>
> THE COURT: It does not have to be covered on direct. If he denies something under oath, which is—

According to the view of the trial judge and the prosecutor, defendant could be asked on cross-examination a question, which answered affirmatively would admit the incriminating tendencies of the illegal evidence, and, answered negatively would allow the subsequent introduction of the illegal evidence for purposes of impeachment. Such a view extends beyond the reach of *Walder*, *Harris* and *Hass*.

Alternatively, the government now argues that even if the stated basis for the trial court's ruling was incorrect there still was no error. It contends that Havens' impeachment was amply justified by his testimony on direct. Our understanding of the record will not support such a conclusion.

McLeroth testified that on his first trip to Peru he brought back cocaine draped over his body and secured by tape and an ace bandage. Utilization of the T-shirt on subsequent trips was intended to be an improvement. McLeroth first mentioned it in connection with a second trip that proved fruitless because no cocaine could be obtained. According to McLeroth, the pocketed T-shirt was fabricated in the

United States and used to carry the "buy" money to Peru.

On direct examination Havens was not asked whether he possessed the incriminating T-shirt at the time he entered the United States or at any other time. His own counsel did not ask Havens anything at all about a T-shirt, nor was he asked about the contents of his luggage. He was first questioned along these lines during cross-examination and all the impeachment evidence was calculated to contradict testimony given by Havens on cross-examination.

The question before us falls squarely within the Supreme Court's ruling in *Agnello*. The trial court's contrary ruling necessitates reversal of Havens' conviction.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5411

D. C. Docket No. 77-479-CR-JLK

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

versus

J. LEE HAVENS, DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Southern District of Florida

Before WISDOM, GOLDBERG and VANCE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

April 5, 1979

ISSUED AS MANDATE: Jul 5 1979

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5411

[Filed June 27, 1979]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

J. LEE HAVENS, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion 4-5-79, 5 Cir., 197—, —— F.2d ——).

(June 27, 1979)

Before WISDOM, GOLDBERG and VANCE, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court

be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-63

UNITED STATES, PETITIONER

v.

J. LEE HAVENS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the appplication of counsel for petitioner(xx),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 26, 1979.

/s/ Lewis F. Powell, Jr.
LEWIS F. POWELL, JR.
Associate Justice of the
Supreme Court of the
United States

Dated this 20th
day of July, 1979.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 299388 57